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The Buyer's Right to Require Reimbursement for Repair Costs of Defective Goods under the CISG, the CESL, and Estonian Law

1. Introduction

Under what conditions the buyer has a right to require reimbursement for repair costs incurred through lack of conformity of goods is undoubtedly a central issue in sales law. The analysis in this article compares the conditions under which the buyer's right to require reimbursement for repair costs arises under the terms of the United Nations Convention on Contracts for the International Sale of Goods (or 'CISG')¹, the proposed common European sales law (CESL)², and the Estonian sales law (the Law of Obligations Act, hereinafter referred to as the LOA)³, along with how the seller's interest in minimising costs and his right to secondary performance are ensured. The authors seek to highlight considerable dogmatic and practical differences in the solutions provided by the above-mentioned regulations, focusing on the balance of obligations and rights between the buyer and seller under B2B contracts.

The authors present a hypothesis that the institution of cure and that of granting of additional time differ fundamentally in how they function in balancing the interests of the seller and buyer. Cure prioritises the buyer's interests and leaves the risk of communication to be borne by the seller. The institute of granting additional time, in contrast, gives priority to a claim for performance, and shifting from this claim to a claim for repair costs usually requires prior active intervention by the buyer.

¹ RT II 1993, 21/22, 52 (in Estonian).

² Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> (most recently accessed on 17.2.2014).

³ Võlaõiguseadus. – RT I 2001, 81, 487; RT I, 29.11.2013, 1 (in Estonian).

2. Cases

The following cases are used as examples for purposes of analysing the differences in the buyer's right to require reimbursement for repair costs and giving effect to the seller's right to secondary performance under the CISG, CESL, and LOA.

A brick factory (B) from country X buys from undertaking S, in country Y, industrial equipment for EUR 100,000. Although S delivers the goods on time on 4 March, they display defects. On 9 March, B sends an e-mail message to S, describing the defects.

Scenario 1: On 11 March, a representative of S replies that he has received the e-mail and will look into the matter. On 11 April, B demands that S provide reimbursement for the costs incurred in remedying the lack of conformity, in the amount of EUR 25,000.

Scenario 2: By a letter dated 9 March, B demands reimbursement of repair costs in the amount of EUR 25,000. On 10 March, S refuses and expresses a wish to remedy the lack of conformity himself.

Scenario 3: On 11 March, a representative of S notifies B that he will remedy the lack of conformity by 25 April. On 20 March, B decides to remedy the lack of conformity and orders C to do the work (for EUR 25,000). On 29 March, B demands that S reimburse B for EUR 25,000. In response, S refuses because of having begun work to cure the non-performance and intending to remedy the lack of conformity by 25 April. Then, B requires reimbursement in the amount of EUR 25,000 or, as an alternative, EUR 12,000, which is how much S saved.

3. Prerequisites for a claim for compensation for damages

The CISG, CESL, and LOA all stipulate the buyer's right to demand from the seller compensation for damages caused by non-performance. A claim for damages involves the seller's right to require reimbursement for repair costs for the non-conforming sale item. The general prerequisites for a claim for damages are, to a large extent, the same across the three sets of regulations. These are:

1. a valid sales agreement and non-performance of an obligation under that agreement (CISG, Article 45(1)(b); CESL, Article 106(1)(b) and Article 159; and §115(1) of the LOA);
2. lack of grounds for release from liability (CISG, Article 79; CESL, Article 159(1) and Article 106(4); and §115(1) of the LOA)—i.e., the non-performance not being excused under the CISG's Article 79, the CESL's Article 88, and Section 103 of the LOA;
3. occurrence of damage (CISG, Article 74; CESL, Article 160; and §115 of the LOA); and
4. a causal link between the non-performance of an obligation and the occurrence of damage (CISG, Article 74; CESL, Article 159; and §115(1) and §127(4) of the LOA).

The main difference lies in the provision related to claiming damages in lieu of performance.^{*4} Pursuant to §115 (2) of the LOA, as a rule, the creditor may demand compensation for damages in lieu of performance only upon the elapsing of the additional time within which the debtor does not perform.^{*5} The CISG and CESL do not set forth such specific regulations on claims for damages; nor is there any obligation to grant additional time.

In the case of a claim for damages arising from the non-conformity of goods, none of the regulations considered here deem it sufficient if only the above-mentioned prerequisites have been met. It is additionally required that^{*6}:

1. the defect existed during the time of passing of the risk to the buyer (CISG, Article 66; CESL, Article 105(1); and §218 (1) of the LOA);

⁴ In German, 'Schadensersatz statt der Leistung'. See Section 281 of the Bürgerliches Gesetzbuch (BGB).

⁵ Exceptions—scenarios wherein it is not necessary to grant additional time—are stipulated in §115 of the LOA (in Subsections 2–3).

⁶ For the CESL, see O. Remien *et al.* *Gemeinsames Europäisches Kaufrecht für die EU?* ['Common European Sales Law for EU?']. Munich: Verlag C.H. Beck 2012, pp. 162–187 (in German); for the LOA, consult the textbook case of the CCSCd 3-2-1-156-11.

2. the buyer was not aware of the defect at the time of entering into the contract and did not have to be aware of it (CISG, Article 35(3); CESL, Article 104; and §218 (4) of the LOA);
3. no agreement restricting the liability of the seller has been concluded, or the seller may not rely on an agreement of this nature (CISG, Article 79; CESL, Articles 1 and 108; and §221 (2) of the LOA); and
4. the buyer has given notice of the defect on time (CISG, Article 39; CESL, Article 122(1); and §220 (3) and §221 of the LOA).^{*7}

With respect to claims for damages resulting from non-performance or non-conforming performance, excusability is considered the general standard for liability by all of the regulations (CISG, Article 79; CESL, Article 88; and §103 of the LOA). However, there is some debate under Estonian law as to whether the seller is released from liability if the lack of conformity of the goods is caused by *force majeure*—i.e., is excused. In this respect, differing views have been taken in the legal literature and the practice of the Supreme Court is inconsistent.^{*8}

4. The purpose of the seller's right to secondary performance

The main example of a non-conforming performance by a seller is a defect in the goods sold (see CISG, Article 34; CESL, Articles 99–102; and §217 of the LOA). This condition grants the buyer the right to legal remedies. The buyer may, in principle, choose which legal remedy to exercise. First and foremost, the buyer has to make an economic decision expressing whether he wants to uphold the contract (claim performance) or avoid (even if only partially) further performance by the debtor (e.g., via withdrawal, price reduction, or a claim for compensation for damage in lieu of performance). The analysis below focuses on the conditions and limitations for filing a claim for damages in respect of remedying a lack of conformity of goods.

For purposes of balancing the parties' interests in the performance of the contract, particularly with regard to bearing the costs of performance and expected profit from the performance, the exercise of legal remedies that terminate the seller's duty of performance—i.e., preclude substitute performance or repair—is usually limited. The idea is to ensure that the seller has an opportunity to complete the contractual performance and earn the total purchase price (through so-called secondary performance).^{*9} The legal solution and the manner in which this purpose is achieved vary considerably in the regulations under comparison, having a direct effect on the balance of rights of the seller and buyer and on their possibilities to act.

As a rule, damage resulting from the remedying of the defect materialises when the buyer commissions repair work from a third party and files a claim for damages against the seller to recover the repair costs. Such damages in the form of repair costs can be considered to be damages in lieu of performance. Damages in lieu of performance are a form of damages that could be avoided through the seller repairing or replacing the goods—i.e., by the seller's secondary performance.^{*10} Therefore, in the case of a claim for damages in lieu of performance, the buyer no longer wants the seller to perform and will gain the positive interest intended in the contract through the claim for compensation for damages. This renders the seller's

⁷ The claim may still be filed, provided that the defect constitutes a circumstance that the seller was aware of or should have been aware of (see the CESL's Article 122(6) and, providing similarly, §221 of the LOA).

⁸ On this problem, see K. Sein, *Estland – ein Versuchsfeld für das Europäische Privatrecht? [Estonia—a Test Country for European Private Law?]*. – *European Union Private Law Review* 2013/1, pp. 15–16 (in German). See also CCSCd, 3-2-1-156-11; CCSCd, 3-2-1-55-12, both available via <http://www.nc.ee/> (in Estonian) (most recently accessed on 17.2.14).

⁹ For example, P. Varul *et al.* *Võlaõiguseadus I. Kommenteeritud väljaanne* [Law of Obligations Act I. Commented edition]. Tallinn: Juura 2006, pp. 341, 387–388, 393–394 (in Estonian); R. Schulze, *Common European Sales Law (CESL): A Commentary*. Baden-Baden, Germany: C.H. Beck, Hart, Nomos, 2012, Article 109, comments 1–3; E.C. Schneider, The seller's right to cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods. – *Arizona Journal of International and Comparative Law* 1989–1990, pp. 69–103.

¹⁰ On the definition of damages in lieu of performance, see S. Lorenz, *Grundwissen – Zivilrecht: Schadensarten bei der Pflichtverletzung (§280 II, III BGB)* [Ground Knowledge—Civil Law: Claim for Damages by Breach of Obligation (§280 II, III BGB)]. – *Juristische Schulung* 2008/3, pp. 203–205 (in German); P. Ostendorf, *Die Abgrenzung zwischen Schadensersatz statt und neben der Leistung – Versuch einer Neubetrachtung* [Differentiation of Damages Together With and in lieu of Performance—Attempt for a Revision]. – *Neue Juristische Wochenschrift* 2010, pp. 2833–2838 (in German).

performance impossible and the claim for performance is terminated.^{*11} This, however, means that the seller must deduct damages related to substitute performance from the anticipated profit under the contract (i.e., from the purchase price). Thereby, the seller loses the expected profit under the contract. Next, we will analyse how the seller's right to secondary performance functions in the CISG, CESL, and LOA.

Unlike the LOA and the Bürgerliches Gesetzbuch (BGB), the CISG and CESL do not stipulate any stricter requirements for compensation for damages in lieu of performance compared to damage claim together with performance.^{*12} The buyer's right to demand compensation for damages does not require the granting of additional time for the seller.^{*13} Accordingly, the buyer is not, in principle, forbidden to make a claim for damages in lieu of performance as the first legal remedy (compare the CISG's Article 45(1)(b) and the CESL's Article 106(1)).^{*14} *Inter alia*, the buyer may, in the case of defective goods, require reimbursement of repair costs by filing a claim for damages.^{*15} It does not, however, follow from the terms of the CISG and CESL that the seller cannot remedy the lack of conformity at his own expense and thereby avoid damages related to the buyer's right of recourse arising on account of repair costs.

The seller has an opportunity to remedy the lack of conformance at his own expense through the institution of cure under the CISG's Article 48 and the CESL's Article 109. Cure is one of the most important means to ensure that the contract will still be performed while the buyer's right to terminate the contract is restricted and the seller is given another chance to earn the total purchase price and minimise his losses.^{*16} In this respect, the purpose of cure is largely similar to the granting of additional time under the BGB and LOA.^{*17} However, there is a considerable difference in how cure is given effect in balancing of the interests of the buyer and seller. Since the regulation of cure differs somewhat between the CISG and CESL, the prerequisites for the seller's right to cure and its significance for the buyer's claim for reimbursement of repair costs are analysed separately.^{*18}

5. The seller's right to secondary performance under the CISG

Pursuant to the CISG (Article 48(1)), the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligation.^{*19} The seller has this right, however, only if he can remedy the non-performance without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of the seller's reimbursement of expenses advanced by the buyer.^{*20} The essence of the right

¹¹ Compare Section 281(4) of the BGB. See, for example, H. Prütting *et al.* (eds). *BGB. Kommentar* ['The BGB: A Commentary'], 8th ed. Cologne, Germany: Luchterhand Verlag 2013, Section 281, margin No. 22-23 (in German).

¹² See Subsection 4.3.

¹³ *Münchener Kommentar. Bürgerliches Gesetzbuch. Schuldrecht. Besondere Teil I. Band 3. §§ 433-610. CISG. 6. Auflage* ['BGB §§ 433-610 and CISG: A Commentary']. Munich: C.H. Beck 2012, Article 47, margin No. 2 (in German); AG München (Judgement. V. 23. Juni 1995 – 271 C 18968/94), CISG-Online, No. 368 (in German).

¹⁴ M. Schönknecht. *Die Selbstvornahme im Kaufrecht* ['Substitute Transaction in Sales Law]. Doctoral dissertation. Baden-Baden, Germany: Nomos 2012, p. 127 (in German); M. Schmidt-Kessel (ed.). *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* ['Common European Sales Law? Analysis of EC's Proposal]. Munich: Sellier 2012, pp. 504–506 (in German).

¹⁵ See OGH (Judgement. V. 14. January 2002 – 7 Ob 3001/01t), Internationales Handelsrecht 2002, 76, 80, see also CISG-Online, No. 643; AG München (Judgement. V. 23. June 1995 – 271 C 18968/94), CISG-Online, No. 368 (all in German).

¹⁶ For the CESL, see S. Kruisinga. The seller's right to cure in the CISG and the Common European Sales Law. – *European Review of Private Law* 2011/6, p. 910; R. Schulze (see Note 9), Article 109, Comment 1. On the CISG, see J. von Staudinger. *Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht. CISG. Neubearbeitung* ['CISG Commentary. Revised edition]. Berlin: Walter de Gruyter, Article 48, margin No. 2-7 (in German).

¹⁷ For more on this, see Subsection 4.2 of the paper. For a comparison between additional time and right to cure under the BGB, see S.H. Höffmann. *Die Nachfrist im Leistungsstörungenrecht* ['Additional Time in case of Breach of Obligation]. Doctoral dissertation. Frankfurt am Main: PL Academic Research 2013 (§4, §6 II, III) (in German); U.G. Schroeter. Das Recht zur zweiten Andienung im System des Schuldrechts ['Right to Secondary Performance in Law of Obligations Systematics]. – *Archiv für die civilistische Praxis* 207 (2007), pp. 28–63 (in German). – DOI: <http://dx.doi.org/10.1628/000389907780054136>.

¹⁸ This analysis focuses only on the right to secondary performance after the date for delivery has passed.

¹⁹ In German thought, the concept is *Recht zur zweiten Andienung*; see *Münchener Kommentar* (Note 13), Article 48, margin No.1 (in German).

²⁰ Right to cure is an actual rule, the buyer has to bear the burden of proof with respect to any unreasonableness. See J. von Staudinger (Note 16), Article 48, margin No. 46 (in German); P. Schlechtriem, I. Schwenzer. *Kommentar zum Einheitlichen*

to cure is the limiting of the buyer's rights and thereby creation of a possibility for the seller to remedy the lack of conformity at his own expense. Therefore, at the time of cure—i.e., until the remedying of the lack of conformity turns into an unreasonable delay (see Article 48(1))^{*21}—the buyer may not exercise legal remedies that are inconsistent with the remedying of the non-performance by the seller (see CISG, Article 48(1) and the second sentence of paragraph 2).

The seller's second chance for performance that is guaranteed through cure does not materialise automatically. There is no general restriction on the buyer's choice of legal remedies or on the seller's right to remedy the lack of conformity at his own expense.^{*22} Cure is merely the seller's right to remedy the lack of conformity at his own expense, a right given effect only if he actively exercises it. How is the seller's right to cure given effect?

It is not apparent from the first paragraph of the CISG's Article 48 what the seller has to do to enjoy the rights and protection related to cure. In addition, the wording of Article 48(1) does not stipulate that the creation of the right to cure depends on the seller notifying the buyer of his wish to remedy the lack of conformity at his own expense. However, the seller's obligation to notify can be inferred from the principle of good faith (CISG, Article 7(1)), as otherwise it would remain unclear for the buyer what his legal position is, including whether he has the right to reduce the price or require reimbursement of repair costs, until the reasonable period for cure expires.^{*23}

On the other hand, the seller risks losing the protection guaranteed by cure if he fails to notify of his intention to cure, because the buyer's legal remedies have their limitations only if notice of the intention to cure is given (under Article 48(1) and the second sentence of paragraph 2). It follows that, in order to obtain the right to cure and the related protection, the seller must notify the buyer and offer to remedy the lack of conformity. The seller's right to notify of cure is not, however, unlimited. In the interests of legal clarity, the seller must offer to cure without unreasonable delay after the buyer has notified him of the lack of conformity (see Article 39).^{*24}

Sample case, scenario 1: B has a claim for reimbursement of repair costs under the CISG, unless S can claim cure; S does not have the protection of cure, because he has not notified B of his intention to cure in due time and has not remedied the lack of conformity without unreasonable delay (see CISG, Article 48(1)). Accordingly, S must pay EUR 25,000.

The effects of cure arise at the time of notification of the intention to cure. The essence of cure is that the buyer may not, at the time of cure, use legal remedies inconsistent with the seller's right to remedy the lack of conformity at his own expense (see Article 48(1) and the second sentence of paragraph 2). The CISG's Article 48(1) does not explicitly specify what the relationship between cure and the buyer's claim for repair costs is. However, on account of the nature of the claim for repair costs terminating performance under the contract, it must be deemed inconsistent with the seller's right to remedy the lack of conformity at his own expense if the buyer files a claim for repair costs. Accordingly, it follows from the combined effect and purpose of Article 48(1) and the second sentence of the second paragraph that at the time of cure the buyer cannot demand compensation for repair costs—i.e., have a third party remedy the lack of conformity of the sale item at the seller's expense.^{*25} This is so mainly because otherwise the purpose of the regulation of

UN-Kaufrecht. – CISG- [‘CISG Commentary’]. Munich: Verlag C.H. Beck 2013, Article 48, margin No. 13 (in German).

^{*21} For discussion of the period for cure, see C.M. Bianca, M.J. Bonell. *Commentary on the International Sales Law*. Mailand, Germany: Giuffrè 1987, Article 48, 2.1.1.1.2; P. Schlechtriem, I. Schwenzer (*ibid.*), Article 48, margin No. 9.

^{*22} With respect to the non-existing priority of the claim for performance, see C. Benicke in *Münchener Kommentar zum HGB. CISG*, Chapter 3 (HGB and CISG Commentary). Munich: C.H. Beck 2013, Article 46, margin No. 2 (in German); M. Schönknecht (see Note 14), p. 129 (in German).

^{*23} S. Kröll *et al.* (eds). *The United Nations Convention on Contracts for the International Sale of Goods: Article by Article Commentary*. Munich: C.H. Beck 2011, Article 48, Comment 13.

^{*24} *Münchener Kommentar* (see Note 13), Article 48, margin No. 8a (in German); see also P. Schlechtriem in *Lebendiges Recht. Festschrift für Reinhold Trinkner zum 65. Geburtstag* [‘Changing Law. Collection for Reinhold Trinkner’s 65th Birthday’]. Heidelberg, Germany: Verlag Recht und Wirtschaft GmbH 1995, pp. 321, 328 ff (in German).

^{*25} J. von Staudinger (see Note 16), Article 48, margin No. 31, margin No. 35 (in German); *Münchener Kommentar* (see Note 13), Article 48, margin No. 21–22 (in German); P. Schlechtriem, I. Schwenzer (see Note 20), Article 48, margin No. 21 (in German); M. Karollus. UN-Kaufrecht: Vertragsaufhebung und Nacherfüllungsrecht bei Lieferung mangelhafter Ware [‘CISG: Termination and Claim for Performance by Delivery of Defective Goods’]. – *Zeitschrift für Wirtschaftsrecht* 1993, p. 491 ff (in German); see also OGH (Judgement. V. 14. January 2002 – 7 Ob 3001/01t), *Internationales Handelsrecht* 2002, 76, 80, also CISG-Online, No. 643 (in German); OLG Hamburg (Judgement. V. 9. Juni 1995 – 11 U 191/94), *NJW-RR* 1996, 179, 180, also *IPRax* 1996, 269 (in German).

cure would not be achieved in the context of repair costs—granting the seller a second chance. If the buyer were allowed to claim repair costs, it would be impossible for the seller to remedy the lack of conformity at his own expense and minimise costs; neither could the seller avoid compensating for a third party's profit. Therefore, cure prevails over the buyer's claim for repair costs, which is a legal remedy contrary to the purpose of cure. Such an interpretation is also supported by the legal literature.^{*26}

Sample case, scenario 2: Since S offered to cure right after B notified him of the lack of conformity (see the CISG, Article 48(1))—i.e., in due time—B's claim for damages does not preclude S's right to cure. Here, B's claim is unsuccessful.

The seller's right to cure may also arise when he, in fact, has no such right under the first paragraph of Article 48 of the CISG.^{*27} If, in such a case, the seller still offers to cure, the result set out in the second paragraph of that article comes about. Thus the seller's right to cure arises if he has been late in offering to cure or has offered to cure in a manner otherwise inconsistent with the buyer's interests under Article 48(1) but the buyer notifies of the refusal of cure with unreasonable delay or fails to do so altogether.^{*28} In such a case, the seller is deemed to have agreed to the cure by dint of conduct. But if the buyer refuses an offer to cure in due time, the seller will not have the protection arising from cure. In such a case, the existence of the right to cure should be assessed only pursuant to the CISG's Article 48(1).^{*29}

Sample case, scenario 3: Since B has not replied to S's offer to cure, the CISG's Article 48(2) shall apply, meaning that B cannot claim reimbursement for repair costs (see also paragraph 1 and the second sentence of paragraph 2).

If, despite the creation of the right to cure (CISG, Article 48(1) and the second sentence of paragraph 2), the seller does not remedy the lack of conformity during the period for cure or refuses to cure,^{*30} the limitations on the buyer's legal remedies no longer apply. The buyer may, at his discretion, exercise a legal remedy available in consequence of the non-performance. Among the options available is requiring compensation for repair costs.^{*31}

6. The seller's right to secondary performance under the CESL

The regulation of cure under the CESL's Article 109 is considerably different from the under the CISG. Firstly, the seller has a right to offer cure only in the case of non-conforming performance. In cases of delay, the parties' rights are ensured through the regulation of additional time (in Article 115(1)) and a right to damages (in Articles 159–165). Secondly, the seller's right to cure is not precluded by the buyer's (earlier) withdrawal from the contract (see Article 109(3)). Thirdly, the seller has a general right to cure. The existence of the right to cure is presumed. The buyer may refuse an offer to cure only in the cases specified in Article 109, paragraphs 4a–4c.^{*32} Fourthly, the CESL's Article 109(2) clearly provides that, in order to cure, the seller must notify the buyer of the offer to cure. The seller has the right to cure only if he offers to cure the lack of conformity immediately after the buyer has informed him thereof.^{*33}

Sample case, scenario 1: B has a claim for reimbursement of repair costs, except when S can claim cure. Since S has not offered to cure, he does not have the protection arising from cure (see Article 109(6)). In this case, S must pay EUR 25,000.

²⁶ *Münchener Kommentar* (see Note 13) (Article 46, margin No. 64; Article 48, margin No. 21; and Article 74, margin No. 35); J. von Staudinger (see Note 16), Article 48, margin No. 35; P. Schlechtriem, I. Schwenzer (see Note 20), Article 48, margin No. 21, 23 (all in German).

²⁷ C. Brunner, *UN-Kaufrecht – CISG. Kommentar* [CISG Commentary]. Berlin: Stämfli 2004, Article 48, margin No. 13 (in German); P. Schlechtriem, I. Schwenzer (*ibid.*), Article 48, margin No. 27.

²⁸ As a rule, the buyer must notify of refusal quickly but need not do so immediately: W.-A. Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* [CISG Commentary]. Neuwied, Germany: Luchterhand (200), Article 48, margin No. 9 (in German); J. von Staudinger (see Note 16), Article 48, margin No. 42 (in German).

²⁹ C. Brunner (see Note 27), Article 48, margin No. 14 (in German).

³⁰ OLG Hamburg (Judgement. V. 9. June 1995 – 11 U 191/94), NJW-RR 1996, 179, 180, also as IPRax 1996, 269 (in German).

³¹ J. von Staudinger (see Note 16), Article 48, margin No. 34 (in German).

³² S. Kruisinga (see Note 16), paragraph 4.3 on pp. 918–919.

³³ Compare with the buyer's obligation to notify as described by S. Kruisinga (*ibid.*), paragraph 4.3 on p. 918–919.

Similarly to the CISG, the CESL does not explicitly regulate the relationship between cure and the buyer's claim for repair costs. However, making a claim for repair costs must be deemed inconsistent with the seller's right to cure also under the CESL (Article 109(6)); see Section 5 of this paper.

Similarly to that under the CISG, cure here has a restrictive effect on the buyer's legal remedies, as otherwise cure would not serve its purpose.^{*34} Pursuant to the CESL's Article 109(6), the buyer may withhold performance pending cure, but the rights of the buyer that are inconsistent with allowing the seller some time to effect cure are suspended until that time has elapsed. Therefore, from the time the seller offers to cure until cure is effected—i.e., until refusal of cure (see Article 109(4))—the buyer may not withdraw from the contract, reduce the price, or demand compensation for damages in lieu of performance.^{*35} *Inter alia*, the buyer may not demand compensation for repair costs. The CESL does not explicitly specify the outcome of a situation wherein the buyer has filed a claim for compensation for repair costs before the seller has offered to cure—for example, in the notice of non-conformity. Evidently the seller's right to cure should not be precluded in such a case either, because otherwise the race between the buyer's claim for repair costs and the seller's notice of offer to cure could lead to a result that is inconsistent with the purpose of cure. This is indirectly confirmed by Article 109(3), pursuant to which an offer to cure is not precluded even if the buyer has already withdrawn from the contract. The result should not be different in the case of filing a claim for repair costs.

Sample case, scenario 2: Since S offered to cure right after B notified him of the lack of conformity (see Article 109(2)—i.e., in due time—B's preventive claim for damages does not preclude S's right to cure, and B's claim is unsuccessful.

Unlike the CISG's Article 48(2), the CESL in its Article 109 does not explicitly regulate the situation wherein the seller offers to cure but violates the conditions of cure. Pursuant to paragraph 1 of the CISG's Article 48, the seller has to consider, *inter alia*, the interests of the buyer when offering to cure; however, the CESL's Article 109(2) merely stipulates that the seller must notify of the offer to cure without undue delay. It is not clear what the consequence of the seller's violation would be. Pursuant to the CISG's Article 48(2), the buyer must notify the seller of any refusal of cure, and the buyer is deemed to have agreed to the cure if he does not object. Because of the principle of *favor contractus*, which is firmly established in regulation of cure under the CESL, an interpretation should be preferred according to which the buyer's failure to notify of the refusal of cure or unduly delayed notification gives rise to the seller's right to cure. A different result would lead to non-compliance with the principle of good faith. The foregoing should apply also if the buyer has the right to refuse an offer to cure under Article 109, paragraphs 4a–4c but fails to exercise that right. It follows from the logic of the CESL's Article 109, paragraphs 2 and 4 that cure can only be precluded via timely refusal of an offer to cure by the buyer. This conclusion is supported by the burden of proof borne by the buyer in respect of circumstances precluding cure.^{*36}

Sample case, scenario 3: Since B has not refused an offer to cure (see Article 109(4)), S has a right to cure (Article 109(2)). In this case, B's repair costs shall not be reimbursed (see Article 109(6)).

7. The seller's right to secondary performance under the LOA

7.1. The buyer's obligation to grant additional time

The LOA grants the seller a secondary performance and the possibility to earn thereby the total purchase price through the buyer's obligation to grant additional time, an obligation rooted in the BGB.^{*37} Therefore, the view has been taken in commentary on the LOA that in the case of lack of conformity of a sale item, the buyer, at first, usually has only the right to demand performance, whereas other legal remedies are secondary.^{*38} Among other things, the buyer may, as a rule, demand compensation for repair costs (that is,

³⁴ S. Kruisinga (*ibid.*), pp. 916–917; also R. Schulze (see Note 9), Article 109, Comment 27.

³⁵ Similarly R. Schulze (*ibid.*), Article 109, comments 27–33.

³⁶ S. Kruisinga (see Note 16), paragraph 4.3, on p. 918

³⁷ See P. Varul *et al.* (Note 9), p. 391 (in Estonian); compare BGB, sections 280, 281.

³⁸ See P. Varul *et al.* *Võlaõiguseadus II. Kommenteeritud väljaanne* [‘Law of Obligations Act II. Commented edition’]. Tallinn: Juura 2007, p. 37 (in Estonian); this does not apply to the buyer's right to withhold performance under sections 110 and 111

damages in lieu of performance) only if the buyer has granted the seller additional time to remedy the lack of conformity but the seller has failed to do so within that time (see §115(2) of the LOA; compare the first sentence of paragraph 1 of §281 of the BGB).^{*39} The additional time gives the seller his last chance to remedy any lack of conformity.^{*40} In exceptional circumstances, the buyer may claim damages without granting additional time (see §115 (3) and (4) of the LOA).^{*41}

The requirement that the buyer grant the seller additional time presumes active intervention on the buyer's part in shifting from the claim for performance to a claim for damages in lieu of performance. This applies to repair costs as a subcategory of claims for damages in lieu of performance.^{*42} It is both the right and the obligation of the buyer to grant an additional amount of time. This is a right because of the possibility of shaping all of the various legal remedies at his disposal and also for achieving legal certainty with respect to filing a claim for damages in lieu of performance or withdrawal from contract (see §115(3) and §116(2) of the LOA). But it is also an obligation: without additional time, the buyer cannot, in general, exercise legal remedies that terminate the claim for performance.^{*43}

Sample case, scenarios 1–3: Since B has not granted additional time for S to remedy the lack of conformity, he has no right to claim reimbursement of repair costs (under §115(2) of the LOA). Under the LOA, unlike under the CISG and CESL, B's claim will not be successful even in scenario 1.

Mere notification by the buyer of the non-conformity of the goods (see §220 of the LOA and similarly addressed in the CISG's Article 39 and the CESL's Article 122) is not equivalent to the granting of an additional span of time, because these notices serve different purposes (compare §220(3) of the LOA and §115(2) of the LOA). The notice of granting additional time must make it clear for the seller that he is being given a last chance to remedy the lack of conformity.^{*44}

The additional time granted to the seller must be reasonable in length (under §114(1) of the LOA). If the buyer demands performance of an obligation but does not grant an additional span of time therefor, reasonable additional time is presumed to have been granted. The law presumes that the additional span of time commences also when the buyer submits a claim for performance or a notice stating that he still wants performance. Such regulation does not provide legal certainty. It also follows from the second and third sentence of Section 114 that the length of the additional stretch of time or its having elapsed does not have to be specified.^{*45} However, the seller must keep in mind that if he does not start to remedy the lack of conformity after receiving the claim for performance, the buyer may, after reasonable time has passed from the submission of the claim for performance, demand compensation for repair costs even if no additional time has been expressly granted. Therefore, the seller bears the risk related to interpreting the buyer's declaration of intention to grant an additional amount of time. If the buyer has granted an unreasonable amount of additional time for performance, it shall be extended to a span of time that is reasonable in length.^{*46}

7.2. Claims for repair costs under the LOA's §222 (5)

The buyer's right to repair an item himself and demand the seller to compensate for the repair costs stems also from §222 (5) of the LOA, which stipulates that if the purchaser legitimately requires the repair of a thing and the seller fails to repair that thing within reasonable time, the purchaser may repair the thing or have the thing repaired and then claim compensation for any reasonable costs incurred in so doing from

of the LOA (compare CISG, Article 48(2) and CESL, Article 109(6)).

³⁹ P. Varul *et al.* (see Note 9), pp. 387–388 (in Estonian); see also CCSCd, 3-2-1-5-12.

⁴⁰ *Ibid.*, p. 388.

⁴¹ See also CCSCd, 3-2-1-5-12; CCSCd, 3-2-1-106-11; CCSCd, 3-2-1-148-08.

⁴² See CCSCd, 3-2-1-115-04. On a similar note, see CCSCd, 3-2-1-62-08; CCSCd, 3-2-1-5-12; CCSCd, 3-2-1-106-11; CCSCd, 3-2-1-148-08.

⁴³ An exceptional situation is one wherein the seller delays performance and this delay, in time, turns into a (serious) violation that gives the creditor the right to immediately claim damages in lieu of performance (see §281 (2) of the BGB or §115 (3), §116 (1)–4) of the LOA); the right to reduce a price is not restricted by the obligation to grant additional time (under §112 of the LOA).

⁴⁴ P. Varul *et al.* find similarly (see Note 9), p. 388 (in Estonian).

⁴⁵ Matters are handled similarly under the BGB. For example, the BGH has stated that a requirement to perform immediately or without undue delay is sufficient (see BGH NJW 2009, p. 3153, in German).

⁴⁶ The result is similar under the BGB. For an example, see D. Looschelders. *Schuldrecht. Allgemeiner Teil* [Law of Obligations. General Part.], Chapter 11. Munich: Vahlen 2013, margin No. 616 (in German).

the seller. In contrast to §115 (paragraphs 1 and 2) of the LOA, §222 (5) of the LOA regulates the compensation of costs that have already been incurred^{*47}. Clearly, such a claim has, by nature, the same objective: the reimbursement of costs related to remedying of the lack of conformity. This provision enables the buyer to claim compensation for repair costs from the seller also without granting additional time. The seller's right to secondary performance is ensured by the buyer's obligation to require repair and the seller's subsequent right to remedy the lack of conformity within reasonable time. Accordingly, the seller must show active interest in remedying the lack of conformity when the buyer has submitted a claim for performance. In addition, Section 222 (5) of the LOA requires that the buyer's costs have been incurred after the passing of reasonable time since the submission of the claim for performance.

Sample case, scenarios 1–3: Since B has only notified the seller of the lack of conformity and has not submitted a claim for performance to the seller, his claim must not be satisfied (see §222 (5)). Under the LOA, unlike under the CISG and CESL, B's claim should not be satisfied, also in the case of scenario 1.

7.3. The seller's right to cure under the LOA

The seller's right to cure is also stipulated in 107 of the LOA, which is based on Article 7.1.4 of the UNIDROIT Principles of International Commercial Contracts (or PICC).^{*48} It follows that in Estonian law the seller's right to cure exists together with the institution of granting additional time (i.e., the priority of the claim for performance). It is not clear in the legal literature or court practice what the relationship between those two is. It is mentioned in the commentary on the LOA that the seller's offer to cure may overlap in time with the additional time granted by the buyer.^{*49} Whether the seller can preclude the buyer's right to grant additional time with his offer to cure is debatable. Such an interpretation is not convincing, as it would mean that the seller could extend, by the period for cure, the buyer's right to move from performance to compensation for damages by making a proactive offer to cure and thereby extend the additional time. Secondary performance is guaranteed to the seller through the creation of the right to cure. Therefore, there is no need to provide additional protection for the seller by determining an additional amount of time, all the more because the period for cure and the additional time should not be considerably different in practice.

It follows from the foregoing that in a situation wherein the law prescribes an obligation to grant an additional amount of time for a claim for damages in lieu of performance, thereby setting stricter requirements to the exercise of legal remedies that terminate the claim for performance and ensuring that the seller has a possibility of remedying the lack of conformity at his own cost, the necessity of the right to cure in Estonian law is doubtful.^{*50} The objectives pursued with cure—in particular, giving a second chance to the defaulting seller—are achieved through the buyer's obligation to grant additional time, which is explicitly stipulated by the law. Regulation of cure has not been considered a necessary element for the BGB, upon whose example the institution of additional time in the LOA is based, either.^{*51}

Also court practice has, so far, emphasised that additional time must be granted to the buyer as a prerequisite for demanding of repair costs.^{*52} The seller's right to cure has been largely overlooked. However, the Civil Chamber of the Supreme Court has noted that if the debtor has offered reasonable cure to the creditor under Section 107 of the LOA in the form of substitute transaction and the creditor has unreasonably rejected it, the future occurrence of damage coincides with the creditor's will and the non-performance by the debtor is no longer the cause of damage.^{*53}

Finally, it should be mentioned that the practice of the Supreme Court with respect to cure and the granting of additional time is unclear and contradictory and that it, so far, has only addressed the right to withdraw from the contract.^{*54} The contradictory nature of Estonian court practice in this regard demonstrates

⁴⁷ CCSCd, 3-2-1-98-09, on which basis it is a claim for performance, not a claim for compensation for damages.

⁴⁸ P. Varul *et al.* (see Note 9), p. 342 (in Estonian).

⁴⁹ *Ibid.*, p. 390.

⁵⁰ For discussion of the objective of the regulation of cure in the LOA, see P. Varul *et al.* (*ibid.*), pp. 341–343.

⁵¹ The BGB, on which the LOA's institution of additional time is based, does not include regulation of cure either. The objectives of cure are achieved through the obligation to grant additional time. See S.H. Höffmann (Note 17), Sections 4 and 5 (in German).

⁵² See, for example, CCSCd, 3-2-1-115-04 and, similarly, CCSCd, 3-2-1-106-11 and CCSCd, 3-2-1-148-08.

⁵³ CCSCd, 3-2-1-128-13.

⁵⁴ CCSCd, 3-2-1-11-10; CCSCd, 3-2-1-80-10.

that the relationship between cure and the institution of granting additional time is complex and that the necessity for their co-existence in the LOA is questionable. This fundamental issue associated with cure and the granting of additional time could arise also in the context of claiming damages for remedying a lack of conformity.

8. Whether the buyer could claim reimbursement of repair costs on other legal grounds

It follows from the foregoing analysis that if the buyer has not given the seller a possibility to cure and has, instead, had a third party remedy the lack of conformity, or has done so himself he cannot claim reimbursement of such costs under a contract. Such a claim is precluded under Estonian law because the buyer has not granted additional time for the seller to remedy the lack of conformity and has not submitted a claim for performance (in scenarios 1 and 3 in the sample case). Under the CISG and CESL, such a claim is precluded because the buyer did not let the seller cure the non-conformity (in scenarios 2 and 3 in the sample case). The buyer has still incurred costs in the amount of EUR 25,000, which should actually have been incurred by the seller as the deliverer of the defective goods. Here a question arises as to whether the buyer could claim at least partial reimbursement of these costs on the grounds that the seller has thereby saved costs in the amount of EUR 12,000 since he has received the total purchase price (EUR 100,000) despite delivering defective goods.

For 12 years, there was heated debate in German legal literature about this issue: some authors held that a buyer should be allowed to claim reimbursement of the saved repair costs on the basis of provisions on *negotiorum gestio* and unjust enrichment^{*55} or the second sentence of Section 326 (2) of the BGB, which regulates release from the duty to render consideration.^{*56} The Federal Court of Justice of Germany (Bundesgerichtshof, or BGH) clarified this issue in 2005.^{*57} That court held that in such a situation the buyer cannot claim from the seller reimbursement of repair costs in the form of compensation for damages, or on some other legal basis, even through application by analogy of the second sentence of §326 (2) of the BGB. Therefore, under German law a buyer who has a piece of goods repaired without first requesting the seller to repair or replace the defective item is deprived of any possibility of obtaining even partial reimbursement. Next, we examine whether the same conclusion should be reached also if the CISG or CESL were applied to a sales agreement, along with what the resolution of this issue would be under Estonian law.

The literature regarding the CISG and CESL has not discussed this issue in depth. With respect to the CISG, M. Schönknecht is the only one who has found that in such a situation the buyer should be able to claim compensation for costs saved by the seller on the basis of Article 80 of the CISG and the principle of *venire contra factum proprium*^{*58}, but he knowingly leaves the question of whether a claim can exist under national non-contractual provisions unanswered.^{*59} Finding an answer to the last question is further complicated by the fact that the CESL and CISG do not cover unjust enrichment and *negotiorum gestio*. In order to find out whether, in such a case, it would be possible to file a claim under national law that applies to sales agreements, one should first determine whether this issue represents a gap in the scope of the CISG and CESL.^{*60}

⁵⁵ J. Oechsler. Praktische Anwendungsprobleme des Nacherfüllungsanspruchs [‘Practical Problems on Application of Performance Claim’]. – *Neue Juristische Wochenschrift* 2004, pp. 1825–1827 (in German).

⁵⁶ S. Lorenz. Selbstvornahme der Mängelbeseitigung im Kaufrecht [‘Substitute Transaction by Breach of Obligations in Sales Law’]. – *Neue Juristische Wochenschrift* 2003, p. 1418 ff; I. Ebert. Das Recht des Verkäufers zur zweiten Andienung und seine Risiken für den Käufer [‘Seller’s Right to Secondary Performance and related Risks for a Buyer’]. – *Neue Juristische Wochenschrift* 2004, pp. 1761–1764 (both in German).

⁵⁷ Judgement VIII ZR 100/04 of the Federal Court of Justice of Germany, dated 23.2.2005. The opinion is covered in *Neue Juristische Wochenschrift* 2005, p. 1348 (in German).

⁵⁸ M. Schönknecht (see Note 14), pp. 130–133 (in German). A diverging view can be found in P. Schlechtriem, I. Schwenzer (see Note 20), Article 48, margin No. 21 (in German), where Müller Chen denies that repair costs could be reimbursed under Article 80 but does not address in great detail the issue of costs saved by the seller.

⁵⁹ M. Schönknecht (*ibid.*), p. 134.

⁶⁰ With respect to the CESL, see M. Gebauer. Europäisches Vertragsrecht als Option – der Anwendungsbereich, die Wahl und die Lücken des Optionalen Instruments [‘European Contract Law as an Option—Field of Application, Choice and Gaps of the Optional Instrument’]. – *European Union Private Law Review* 2011, p. 234 (in German). As for the CISG, it is stressed that

The crucial issue is, therefore, whether a possible claim for compensation based on, for example, *negotiorum gestio* or unjust enrichment could be considered a gap left by the CISG and CESL and, if so, whether it is an external or internal one. Without any detailed explanation, commentary on the CISG denies that there is a gap with respect to a buyer's claim for repair costs: this is an issue exhaustively regulated by the CISG, and possible claims under national law are out of the question.^{*61} That view must be concurred with—it would not be fair if a seller could not trust the regulation set forth in the CISG and CESL in respect of such a fundamental matter as the seller's liability for non-conforming goods and would have to worry about the possibility of further claims filed under national law. The issue is, by nature, one of the central questions in sales law: what remedies can a buyer exercise against a seller if he has received a defective item, and under what conditions may he apply them? This topic is also one of the main subjects of the CESL^{*62}. Therefore, it must be concluded, also with respect to the CESL, that this issue cannot be considered to involve a gap—whether an external or an internal one. In consequence, the question of whether a buyer refusing cure should be able to claim repair costs from the seller should be answered by the CISG or CESL alone, and additional claims under national law are excluded.

Estonian legal literature and court practice have not discussed the possibility of compensation for costs avoided by the seller. Both the *commentary on the LOA* and judgements of the Supreme Court have taken the view that compensation for repair costs in the case of defective goods is possible only if the buyer has first given the seller additional time to remedy the lack of conformity but the seller has failed to do so within that time.^{*63} However, the same question may be raised under Estonian law—could a buyer who immediately had the defective goods repaired claim from the seller reimbursement of the repair costs saved, on the basis of the provisions on unjust enrichment or *negotiorum gestio*, particularly under §1041 or §1023 (1) of the LOA? Before we can assess whether the circumstances of our case meet the specific prerequisites for these claims, we must answer the question of whether and to what extent the filing of non-contractual claims is allowed under Estonian law when a contractual relationship exists between the parties. It follows from Estonian legal literature and court practice that such a possibility has not been eagerly acknowledged. The general position is that the existence of a contractual relationship precludes claims based on *negotiorum gestio* and also unjust enrichment.^{*64} It is possible to file a claim on a non-contractual basis only if it is allowed *expressis verbis* by the law. In other cases, the existence of non-contractual claims has been rightly ruled out.^{*65} Therefore, it must be concluded that a buyer who has repaired an item without having the right to do so cannot claim full or partial compensation for repair costs under Estonian law either.

resorting to domestic law in cases of gaps can be used only as an *ultima ratio*. See P. Schlechtriem, I. Schwenzer (Note 20), Article 7, margin No. 41 (in German).

^{*61} See *Münchener Kommentar* (see Note 13), Article 48, margin No. 22 (in German); see also P. Schlechtriem, I. Schwenzer (*ibid.*), Article 48, margin No. 21.

^{*62} It is evident from Recitals 26 and 27, along with Recital 33, of the CESL that all matters related to remedies for non-performance do fall within its core material scope.

^{*63} See P. Varul *et al.* (see Note 9), pp. 387–388 (in Estonian); also CCSCd, 3-2-1-5-12.

^{*64} For discussion of claims based on *negotiorum gestio*, see P. Varul *et al.* *Võlaõigusseadus. Kommenteeritud väljaanne III*. [Law of Obligations Act III. Commented edition]. Tallinn: Juura 2009, pp. 568–569 (in Estonian); CCSCd, 3-2-1-44-11, paragraphs 30–32. With regard to claims based on unjust enrichment, see P. Varul *et al.* *Tsiviilõiguse üldosa* [General Part of Civil Law]. Tallinn: Juura 2012, p. 66 (in Estonian); P. Varul *et al.* *Võlaõigusseadus. Kommenteeritud väljaanne III*. [Law of Obligations Act III. Commented edition]. Tallinn: Juura 2009, pp. 582, 618 (in Estonian).

^{*65} For example, it is held that, where *negotiorum gestio* is involved, regulation should not replace a contract and impose on a person unwanted services together with a corresponding duty to pay for them. See CCSCd case 3-2-1-44-11, paragraph 33, along with A. Värvi. Function of *negotiorum gestio* in civil law. – *Juridica* 3/2013, p. 186. The dominant position is that 'in case there is a contract that governs the activities of a *negotiorum gestor*, claims based on *negotiorum gestio* are usually out of the question, except if the *negotiorum gestor* goes beyond what is allowed under the contract when performing the contract' (author's translation), as stated by P. Varul *et al.* *Tsiviilõiguse üldosa* [General Part of Civil Law]. Tallinn: Juura 2012, pp. 65, 67.

9. Conclusions

The buyer's right to claim compensation for repair costs is in one respect fundamentally different between the LOA, on one hand, and the CISG and CESL, on the other. In specific terms, under the CISG and CESL the buyer's claim for repair costs is not a secondary legal remedy and the buyer has the right to require compensation for damages immediately and without any additional conditions. The seller can counter the buyer's claim and minimise costs by actively offering to cure (CISG, Article 48(1) and CESL, Article 109). This means that it is the seller's duty to assess the seriousness of the situation and ensure the protection of his rights. Among other things, the seller has to take into account that if he does not remedy the lack of conformity or notify thereof in due time, he will risk having to compensate for the repair costs.

The seller has to offer to cure without undue delay from the time the buyer notifies of the lack of conformity (under Article 48(1) of the CISG and Article 109(2) of the CESL). A consequence of the offer to cure is that, at the time of cure, the buyer cannot exercise any legal remedies that are contrary to the purpose of cure, including requiring reimbursement of repair costs. In the event that the seller does not offer to cure, he loses the protection that arises from cure and the buyer can immediately file a claim for repair costs. The same applies if the seller's cure is unsuccessful or if he refuses to cure. The buyer will have the obligation to intervene by notifying of refusal of cure in due time only if the seller offers to cure and without regard for whether the offer was made in due time; the combined effect of the CISG's Article 48(2) and the CESL's Article 109 (paragraphs 2 and 4) applies. If the buyer has no right to refuse an offer to cure or he does not refuse in due time, the seller has the right to repair the goods and thereby pre-empt the buyer's claim for repair costs.

Under Estonian law, the buyer will have a right to claim reimbursement of repair costs only if he submits a claim for performance to the seller and reasonable time to remedy the lack of conformity has elapsed (see §222 (5), §115 (1), and §114 (2) of the LOA). Until that time, the seller is protected from the buyer's claim for repair costs. Accordingly, unlike with the CISG and CESL, the nature of the claim for repair costs is secondary in the LOA and the buyer is required to undertake prior active intervention in the non-performance for assertion of his claim. It follows that under the LOA the risk of communication is borne by the buyer but under the CISG and CESL it is borne by the seller. As for the assertion of claims, the CISG and CESL favour the buyer leaving it up to the seller to counter the claim, which requires him to offer actively to cure. The LOA, on the other hand, emphasises the priority of a claim for performance, without the filing of which repair costs usually cannot be claimed. Here, the buyer has to bear the risk of active intervention with regard to the non-performance. The foregoing also means that the hypothesis presented in the introduction to this paper has been supported.

According to the authors of this piece, the logic of the institution of cure should be preferred in balancing of the interests of the seller and buyer. This means that not the seller but the buyer, as the party who delivered the defective goods and breached contractual obligations, should bear the risk of communication and active intervention related to the remedying of a defect. In the case of passivity or inadequacy of measures, the seller knowingly risks having to reimburse repair costs.

If the buyer has not allowed the seller to repair the goods at his own expense and has had a third party remedy the lack of conformity or has remedied it himself, he cannot require the seller to reimburse for the associated costs. Furthermore, the buyer does not have any non-contractual claims to the extent of the costs avoided by the seller on account of the buyer having remedied the lack of conformity, because otherwise the purpose of the seller's right to secondary performance, and also legal certainty, would be harmed.